THE MECHANICS OF CODE REVISION.

The enactment of the Code Revision Bill by the recent General Assembly of Virginia, would seem to render a somewhat detailed examination of the mechanics of code revision, with a view to the scientific preparation of the new code, not untimely.

Prefatory to this discussion it is proper to say that practical experience has taught that codification, even compilation, is an art, not an exact science. It is comparatively a new art in America. Its basic principles are known, and must be strictly applied, if the codifier's work is even to approximate perfection. On the other hand although many rules have been laid down for his guidance, they are not always applicable to all of the infinite variety of detail work in formulating a code, and success does not lie in the too slavish adherence thereto. Difficulties are constantly met and problems frequently arise in the course of this detail work which must be overcome or solved by the common sense of the codifier in light of his experience.

Clear comprehension of the scope of the proposed new code, and the duties and powers conferred upon the commission is essential to a proper examination of the principles of codification and their application to the proposed work.

The important parts of the section defining the duties and powers of the commission are that which directs the appointment of commissioners "to revise, codify, and index * * * the general statute laws of this state; whose duty it shall be to collate, revise and codify all the general statutes, civil and criminal, of this Commonwealth, which may be in force at the completion of their work and properly index the same;" and that which provides that: "In performing this duty the said commissioners shall denote all contradictions, omissions, and imperfections they may discover in the statute law and recommend to the General Assembly how the same may be reconciled, supplied or amended without producing a radical change in the present system of statute law of this state." The other powers conferred on the commission are simply in aid of or ancillary to this general purpose and need not be specifically

set forth. The important words in the above quotation are: "to revise," "codify," and "general statutes;" and it is necessary to ascertain the construction which should be placed upon them, in doing which it may not be amiss to define the term "code" and to distinguish between "codification" and "compilation."

Technically the term "code" means "a body of laws established by legislative authority and intended to set forth in general and systematic form, the principles of the entire law, whether written or unwritten, positive or customary, derived from enactment or precedent." 1 Black's Law Dictionary. The Supreme Court of Georgia has said: "The word 'code' is used frequently in the United States to signify a concise, comprehensive, systematic re-enactment of the law, deduce from both its principal sources, the pre-existing statutes and the adjudications of courts as distinguished from compilation of statute law only."

There is quite a difference between a code of laws for a state and a compilation in revised form of its statutes. The code is broader in its scope and more comprehensive in its purpose. Its general object is to embody as nearly as practicable all the law of the state, from whatever source derived. When properly adopted by the law-making power of a state, it has the same effect as one general act of the legislature containing all the provisions embraced in the volume that is adopted. It is more than evidentiary of the law, it is the law itself. A compilation is only prima facie evidence of the law. It is in no sense new law.

The distinction between "codification" and "compilation" cannot be better stated than by quoting from an article in the *Green Bag* of December, 1913, by W. L. Goldsborough of the Code Committee of the Philippine Islands: "The latter [compilation] may be described as the comparatively hasty and unscientific grouping together of existing laws so that they can be more conveniently used than when scattered through the volumes in which they were from year to year promulgated. * * * 'Codification,' on the other hand, is the logical distribution of existing laws to specific codes, and the concise and systematic

expression and arrangement in the codes of such laws and the new legislation required to form a clear and harmonious whole, designed to meet all present exigencies and to provide so far as possible for the future." The compiler, ordinarily has the liberty of correcting mistakes in punctuation and spelling, and nothing more. The codifier must simplify expression and correct rhetorical errors.

"General statutes" are statutes which apply to and operate uniformly upon all members of any class of persons, places or things, requiring legislation peculiar to themselves in the matters covered by the laws. The term "general," when thus used has a twofold meaning. With reference to the subject matter of the statute it is synonymous with "public" and opposed to "private;" but with reference to the extent of territory over which it is to operate, it is opposed to "local," and means that the statute to which it applies operates throughout the whole of the territory subject to the legislative jurisdiction. The importance of this limitation of the scope of the proposed code will be seen in connection with the outline for the arrangement of the statutes under proper codes and chapters.

"Revision" has been defined by the Supreme Court of Arkansas in construing a Code Revision Act, and the brief legal definition there given is, "to review, alter and amend." There is nothing in this definition that would signify an act of absolute origination. The acts expressed by the word must relate to something already in existence, and it cannot be construed to make it the duty of the revisers to originate and prepare new bills for the legislature to enact into statute laws. "Revision," it was said, "simply means such a modification and amendment of the statute laws then in existence, in addition to they rearrangement, as would render them consistent among themselves, and in harmony with the new constitution of the state—nothing more, nothing less. And when so modified, amended, and rearranged, and so made consistent with themselves, and harmonious with the constitution of the state, they are to be 'reported' to the General Assembly, for its 'adoption or modification.'"

If the above construction of the terms of the act be accepted as correct, it is apparent that less than a technical code and

more than a compilation in revised form is contemplated. Parenthetically it may be proper to state that Virginia has never had a true technical code. The Code of 1887 was what is known as a "partial codification" and Pollard's Code is merely a "Compiled Statutes." The act does not authorize the commission to prepare a code of laws for the approval of the Legislature. It authorizes a "partial codification," i. e., a codification of the existing general statute laws, as opposed to the common law and to special and local statutes; and the powers conferred on the commission are strictly limited to that purpose. The plain object of the act is to obtain a clear orderly expression of the entire body of the general statute law of the state in such form as to serve as the settled law for a number of years and be of convenient use to lawyers and laymen. The duty of the commission, to use the language of the act, is "to collate, revise and codify all the general statutes," in the performance of which they shall "denote all contradictions, omissions or imperfections * * * and recommend to the general assembly how the same may be reconciled, supplied or amended without producing a radical change in the present system of the statute law of this state." This language cannot be construed to make it the duty of the commissioners to prepare new bills of absolute origination for the legislature to enact into statute laws; though necessary to fill up, so to speak, the chasms that may exist in the body of the statute law now in force; for preparing new bills certainly is not "to review, alter and amend," and arrange "under proper titles and chapters" the general statutes which may be in force at the time of the completion of their work. The subsequent provision of the section that the commissioners shall "complete the revision and codification as hereby directed in such manner as * * * will harmonize the general statutes and make the code of statute laws, as existing at the close of their work as complete as possible," does not authorize acts of absolute origination, but must be construed as subordinate to and in harmony with the plain object of the section in which it is found. In brief, the section taken as a whole simply means such a modification and amending of the statute laws now in existence, in addition to their rearrangement, as will render them consistent among themselves, make them operative, and

bring them into such form as to have but one statute on any one subject. The act, for instance, cannot be construed to authorize the commissioners to incorporate the English Bill of Lading Act or the Uniform Sales Law into their report as parts of the new code, unless it be found that such acts are so nearly in line with the Virginia Statutes as not to produce a "radical change" in the present system of statute law. Certainly they are not authorized to report a system of code procedure, abolishing the distinction between law and equity, and abrogating the modified system of common law pleading which prevails in Virginia to-day.

The first step in codification is the adoption of a plan showing the number of books, codes or main divisions into which the statutes are to be grouped, and the name and scope of each, together with the adoption of a tentative division into titles and chapters. This should be done after a careful study of the scope and chapter arrangement of the best modern codes and of codes previously adopted by the law-making body of the jurisdiction for which the new code is in preparation.

In constructing a complete system of codes the best modern practice is to embody the general statutes in four codes, to wit: A Political Code, A Criminal or Penal Code, A Civil Code, and A Remedial Code. This terminology will hereafter be used in referring to the main divisions of the proposed Code of Virginia.

These Codes are scoped along the following general lines:

I. The Political Code should contain all statutes relating to Government, its Departments, Organization, and Administration, its Political Subdivisions, as, for instance, Counties, Cities and Towns, Judicial and Legislative Districts, Magisterial and School Districts, etc.; the statutes relating to Education; Elections; Health; Militia; Morals; Public Instruction; Public Property and Works; Records; Roads; Taxation; and kindred subjects. This code should also contain the Constitution of the State, of the United States and such historical documents as the Legislature may direct, as, for instance, the Declaration of Independence.

II. The Criminal or Penal Code should contain all statutes

in nature of substantive law relating to Crimes and Punishment.

III. The Civil Code should contain the statutes in nature of substantive law relating to Private Persons, whether natural or artificial; Private Property; Obligations; Commercial Regulations; and Torts.

IV. The Remedial Code should contain all statutes relating to Relief, to Procedure in Civil and Criminal Cases, and to Evidence.

The classification above outlined should so far as practicable be followed in the preparation of the proposed Virginia Code.

The limitation of the proposed code to the general statute laws obviates the necessity for a fifth book to bring local and special statutes into the scheme.

The Virginia commissioners might profitably examine the arrangement of the Codes of Alabama, California, Montana, Ohio, New York, and the German Civil Code of January 1, 1900, which is based upon the old German systematic books on Germanized Roman Law. Of course no one would suggest that the German classification be followed by the Virginia commissioners; it is too peculiar and unfamiliar to the American jurist or practitioner. Nevertheless, a review of a good translation of it will serve as an object lesson in thorough constructive legislation and logical classification, and will be well worth the time expended.

The second preliminary step in the work of codification involves an exhaustive examination of all the general statutes contained in the last code and those since enacted. This is necessary for the purpose of determining which are repealed, either expressly or by implication; to enable the commissioners to discover and reconcile those which are conflicting, supply omissions, and correct imperfections; and to enable them to prepare a plain, accurate and concise statement of the law free from uncertainty and ambiguity.

In the course of this examination, in order to avoid the inadvertent omission of provisions of existing law, a set of books of Provisions and Revision should be prepared. The

method is to take copies of the previous code and to cut and paste all its sections, together with the general statutes enacted since its adoption, into a set of blank books. On the margins of these books the commissioners should account for each and every section of such law by notations showing its source, its disposition, i. e., where it has been placed in the new Code, or why it has been omitted, and if it has been repealed, by what act. Unless some such scheme is resorted to the danger of inadvertently omitting existing statutes or sections thereof is very great. The commissioners should ever have in mind the rule of the courts that the mere omission of a statute from a revision of the laws does not necessarily operate a repeal thereof, and the confusion which results from the discovery of such omissions.

The commissioners should as soon as practicable address a circular letter to each member of the Legislature, each chief of a department of the state government, each judge, each commonwealth attorney, each clerk, each lawyer or firm, and each professor of law in the state requesting them to point out all contradictions, omissions or imperfections they have discovered in the statute laws of the state. The letter should ask for specific, not general, criticisms. As a result many imperfections will be brought to the attention of the commissioners by persons specially familiar with the portions of the law in which they are peculiarly interested and many advantageous changes will be suggested by those best knowing the necessity therefor. The circular should, of course, state the period during which suggestions can be received and considered. These suggestions should be arranged by the clerk according to the section numbers of the old code or the volume and page of the acts of the Assembly in which the statute is found, and considered by the commissioners before preparing the corresponding section of the revision. It is difficult to realize the practical importance of abundant criticism and suggestions, especially of practicing lawyers and judges. Its value was recognized by the makers of the German Civil Code, a draft of which, with a summary of the reasons for the changes recommended by the commission, was published several years before the completion of the work This publication elicited numer-

ous suggestions and criticisms from all parts and classes of the German Empire, after which the draft was thoroughly revised. For illustration nearer home, reference may be had to the history of the Uniform Negotiable Instruments Law, which was originally drafted by a learned expert, then revised by a subcommittee of the commissioners on Uniform State Laws, and finally by the commissioners themselves in annual session. In spite of all this care errors crept into the law, probably, for the want of wider publication and abundant searching criticism.

The most important step in the work of codification is the preparation of the drafts of the code sections in the form in which they are to be presented to the law-making body for adoption. Each section should be an accurate, clear and concise statement of the law of the subject to which it relates.

Separate and distinct complete propositions of statute law should not be fused into single sections. And statutes containing two or more such propositions or which apply to unrelated or noncognate matters or subjects should be "unscrambled." A section for each subject is a good general rule.

Expression must be simplified and rhetorical errors and mistakes in punctuation and spelling corrected; but in changing the phraseology of any section regard must be had for the canons of construction resorted to by the courts in interpreting revisions and re-enactments of statutes. Unnecessary changes in phraseology must be scrupulously avoided. They tend to create confusion and doubt; for the construction of the old act will not be changed by such alterations, unless they necessitate it; and the question whether such changes of phraseology were intended to and necessitate a change of construction is one difficult of solution.

The codifier must be accurate in his choice of terms, terminology is as important as phraseology. Hence, no technical term should be employed until the construction placed upon it by the courts has been ascertained. The most approved law dictionary and a good digest of judicially defined words and phrases are indispensable tools of the codifier.

As the work proceeds, and ambiguities, contradictions, imperfections and omissions are discovered in the statutes, pro-

posed sections embodying the changes necessary to clarify, reconcile, supply, or amend such defects must be prepared for presentation to the Legislature. This involves an exhaustive examination of the judicial interpretation of such sections of the old Code and subsequent statutes as have been passed upon by the courts. Where an indefinite or ambiguous statute has been construed, the language of the court clarifying it should be incorporated into the new statute in so far as is practicable.

In the distribution of the statutes to the several codes many of the acts and sections must be broken up and their various provisions placed in its proper code and chapter. A lengthy act relating to private persons, private property, commercial regulation or torts is almost sure to contain both substantive law and remedial provisions. It is necessary to re-draft such statutes into appropriate sections complete in themselves and in conformity to the scope of their respective codes. This distribution also frequently discloses the need of supplementary legislation pertaining to the code in which the provision is itself incorporated or to another code without which the section would be in whole or in part inoperative. In such cases sections embodying such supplementary legislation must be prepared for presentation to the Legislature.

Marginal notations and references indicating the source of the text of each section should be printed on each page of the drafts of the proposed code, and each draft should be accompanied by a table of Provisions and Revision showing where each section of the old code and of each existing law has been placed in the new code or the reason for omitting it.

The act requires the printing of the proposed revision and codification in one volume if "practicable." The better modern practice is to print each code in a volume by itself, each of the books having its own index and also a general index to all of the books. This practice is varied to meet the exigencies of the particular case.

The General Code of Ohio of 1910 consists of four volumes:

Volume I. The Political Code.
Volume II. The Civil Code.
Volume III. The Remedial Code, and The Penal Code.

Volume IV. Contains the Topical Index and the Constitutions and Indices.

The Georgia Code of 1910, consists of two volumes:

Volume I. Contains The Political Code, The Civil Code and The Code of Practice.

Volume II. Contains the Law of Crimes and Punishment, Public Defense, Pensions and Soldiers' Homes.

Each volume contains its own index.

The Code of Laws of South Carolina of 1912, consists of two volumes:

Volume I. Is called The Civil Code.

Volume II. Contains The Code of Civil Procedure and The Criminal Code.

Each volume has its own index.

If it should be found impractical to print the new revision and codification in one volume it would probably be well to print the Civil and Remedial Codes in volume I and the Political and Criminal Codes in volume II. Each one should have its own index and a general index to the other.

In the writer's judgment requiring the commissioners' notes, notations and citations to be printed and bound in a volume separate from the code is a mistake. As the work of codification requires an exhaustive examination of the judicial interpretation of each section of the statutes included in the code, full annotations of each section are, therefore, necessary to its preparation, and they should be printed with the text or as footnotes to the sections, for the convenience of the reader, instead of sending him to the same section number in a separate volume of Commissioners' Notes.

The Georgia Code of 1875 was rather fully annotated, the annotations being printed with the text. The new Georgia Code of 1910 was published without annotations. The result has not proved satisfactory to either the legal profession or the judiciary; and as a result private enterprise is now engaged in preparing a copiously annotated edition.

Since the Commissioners' Notes must be in a separate volume, the marginal citations and references should simply show

the source of the text of each section and at most the important cases in which it has been construed by the Supreme Court of Appeals.

The practice is to print with the Code of Special and Local Laws a table of Provisions and Revision showing the disposition of each section of each act in force at the time of the completion of the codes and the corresponding sections in the old and new codes. These tables are readily made up from the marginal notes in the Book of Provisions and Revision. This table might be printed in the volume of Commissioners' Notes, which the act requires to be printed within six months after the publication of the new code.

Indexing, while not the most important part of the codifiers' work, should be correct and full. The index is of prime importance to the practitioner. Of what value is the statute to him if he cannot find it? Each section of the code should, therefore, be indexed not only under the topic to which it logically belongs and from which it cannot be omitted without palpable error; but under every analogous topic under which the average lawyer would probably look. The system of indexing each section under its proper topic only, sometimes called the single or logical theory of indexing, fails to meet the regiments of the legal profession, and is probably wrong in principal. The lawyer of today has neither the time nor opportunity to acquire expert knowledge of the scope of digest schemes nor to keep in mind a minute logical classification of the statute laws. Moreover, the profession has never seen an index which is strictly logical and never will. Such an arrangement would result in an analytical table of contents, the value of which is well known to any lawyer who has ever attempted to find any subject by referring to such prefatory tables in Minor's Institutes. For these reasons, abundant, rather than logical, indexing is advantageous.

To illustrate the necessity of indexing sections under all likely topics take §§ 738, 743, Pollard's Codes, providing for the remission of fines by the governor, which are indexed under "Fines and Penalties," "Proceedings for Recovery;" yet to the writer's knowledge several of the best lawyers in Virginia have looked under the topic "Pardon" for these provi-

sions. Again take §§ 2494-2497, Pollard's Codes, relating to liens on crops for advances to farmers, which are properly indexed under "Crops" and also under "Liens," "On Particular Estates, Interests or Property Rights," yet the writer has heard more than one complaint because there was no index of "Advances" in Pollard's Code.

The chapter heads of the various codes in alphabetical order or well-known designations therefor should be used as the principle topics, and each and every provision, whether part or all of a section, should be indexed thereunder. Co-ordinate with these topics and also in alphabetical order should be interspersed the remaining title heads of an approved Digest Scheme, such, for instance, as the West Key Number System, or the Michie Encyclopedia Scheme, familiar to all who use Michie's Virginia—West Virginia Digest, under which should be indexed all sections of the Codes which would either be treated in such titles or referred to therefrom. Such an analysis if carefully made would necessarily be full and sufficient for the needs of the most amateurish researcher after provisions of law buried in unmarked sections of the code.

The Code Revision Act requires a single report of the commissioners. This is as it should be. A single report of the entire system of Codes is preferable to partial reports, for only then can it be certain that all of the laws have been logically distributed to their proper codes, and that the codes will harmonize and adequately supplement each other.

After the General Assembly has duly considered the report of the commissioners it should either adopt it in toto or return it to the commission to be modified in accordance with specific instructions and again submitted. The General Assembly should not undertake to tinker with or retailor the codes. That body cannot be sufficiently familiar with the work as a whole to undertake the task of materially altering its structure.

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